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ACTION.**

Supreme Court of Kentucky

2013-SC-000605-MR

CHANCE D. KING

APPELLANT

V. ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 13-CR-00098

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Chance D. King, and Pamela Johnson were involved in a romantic relationship. King had been living with Johnson since December, 2012. On April 9, 2013, Johnson asked King to move out. King complied but left some of his personal items at Johnson's residence. In an attempt to retrieve those items, he began calling and texting Johnson. He left numerous voicemails threatening to kill Johnson and burn her house down if she did not answer the phone. Melissa Bruce, Johnson's cousin and co-worker, testified that she heard these voicemails.

On April 15, 2013, Johnson arranged for King to retrieve the remainder of his personal items. After collecting his things, King told Johnson he needed a ride to his niece's house. Johnson agreed to give him a ride, but insisted that

Ms. Bruce accompany them. Bruce was already at Johnson's home while King was gathering his things.

When they arrived at King's niece's house and were unloading his items, King began cursing and physically accosting Johnson. He assaulted her by pushing her against the car and kicking her. King also screamed that he was both God and Satan, and that he would kill Johnson that night and burn her house down. A neighbor also testified as to this encounter. Johnson and Bruce eventually left the scene. Later that night, Johnson received two voicemail messages. One said, "I'm on my way." The other stated, "I'll see you in the morning."

The next evening, Johnson was returning to her home after dropping off her son at Ms. Bruce's house to spend the night. While Johnson was in the garage, King came running from the backyard toward her. In his left hand, which was covered with a blue and white gardening glove, King was holding a handgun. King was left-handed. Johnson immediately called the police on her cell phone. She testified that King was saying, "Let's do this bitch, come on . . . we're going to do this, bitch." At this time, Johnson was standing near the rear of her car. She stated that King grabbed her by the hair and pulled her toward the garage door button located on the inside wall of the garage. King shoved Johnson to the ground and placed the gun to her face. King then attempted to close the garage door, but in order to reach the wall button he had to release Johnson. During his second attempt at reaching the button, Johnson escaped

and crawled under the garage door as it was closing. She dropped her purse in the process.

Johnson ran away towards her neighbor's house. She testified that, while fleeing, she looked back and saw King pointing the pistol at her. He then fired two shots. Jared Todd Miller, Johnson's next-door neighbor, testified that he heard someone screaming, "He's trying to kill me!" He then heard two shots. Soon thereafter, Todd Miller saw Johnson running towards his door. At that point, King testified that he grabbed Johnson's purse and fled the scene.

Officer Jamie Jenkins of the Central City Police Department arrived on the scene and saw that Johnson was distraught. Believing that King may still be on the scene, Jenkins and another officer searched Johnson's house and the surrounding property. During the search, Jenkins discovered two 9 mm shell casings on Johnson's driveway near her garage. The shells were Federal brand. Officer Jenkins logged the casings into evidence. He returned the next day and retrieved two projectiles from the ground.

The day after the shooting, police officers arrested King at his mother's home. King, his mother, and his adult son, Grady King, all lived in a single-wide trailer. Police found King sitting on a love seat inside the trailer and took him into custody. Central City Police Officer Jeff Ford discovered the 9 mm handgun under the love seat. A blue and white gardening glove and Ms. Johnson's purse were found behind the love seat.

Grady King owned the 9 mm handgun. He testified that he had a full box containing fifty rounds of Federal brand 9 mm ammunition in the home.

However, ten of the fifty rounds were missing from his ammunition box. The handgun used by his father held ten rounds in the magazine and one in the chamber. Grady testified that his father did not have permission to borrow his gun and that he had not requested permission to do so.

King was indicted by a Muhlenberg County grand jury on the following charges: one count of attempted murder; first-degree burglary; possession of a handgun by a convicted felon; and being a first-degree persistent felony offender (“PFO”). King pled guilty to the handgun possession charge and the PFO charge was dismissed. A Muhlenberg Circuit Court jury found King guilty of the remaining charges and recommended a 20-year sentence for the attempted murder conviction and 10 years for the burglary conviction. King also received a 10-year sentence for the handgun possession conviction. The first two sentences were ordered to be served consecutively, and the last to run concurrently, for a total of 30 years imprisonment. The trial court sentenced King in accord with the jury’s recommendation. King now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Two issues are raised and addressed as follows.

Mistrial

King first argues that the trial court erred in denying his motion for a mistrial. We review the trial court’s denial of a properly preserved motion for a mistrial for abuse of discretion. *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). However, the Commonwealth contends that King’s motion was untimely and accordingly advocates for palpable error review. RCr 10.26.

“[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice.” *Major v. Commonwealth*, 177 S.W.3d 700, 709 (Ky. 2005). King’s mistrial motion resulted from the trial testimony of Officer Jenkins, the investigating patrolman who photographed the crime scene and recorded crime scene evidence. Officer Jenkins testified extensively regarding a supplemental report he prepared. The supplemental report was not admitted as a trial exhibit. However, Officer Jenkins appears to have had the supplemental report with him on the witness stand. Jenkins’ supplemental report and testimony discussed the precise location of the two bullet projectiles discovered at the crime scene.

King acknowledges that his trial counsel failed to object at the moment Officer Jenkins testified about the supplemental report. However, the record indicates that defense counsel promptly requested a bench conference and informed the trial court that she had not received the supplemental report during discovery. In fact, the attorney for the Commonwealth also appeared surprised by the existence of this supplemental report and Officer Jenkins’ testimony concerning the report. The trial court allowed the prosecutor to continue to question the officer in open court regarding the supplemental report in an apparent attempt to clarify the confusion.

Accordingly, Officer Jenkins further testified that an initial report was prepared documenting evidence, including the bullet casings. He stated that the supplemental report was automatically created upon his subsequent

discovery of the two bullet projectiles. The projectiles were lodged in the ground at the crime scene and were not uncovered until the day after the bullet casings were discovered and entered into the police evidence record. Jenkins testified that the supplemental report and other materials were provided to the Commonwealth prior to trial. The prosecutor and defense counsel again approached the bench. At that time, defense counsel reviewed the supplemental report prepared by Officer Jenkins. After she read the report, the court asked if she had “anything.” Defense counsel did not object. Accordingly, the Commonwealth resumed questioning Officer Jenkins.

Jenkins proceeded to testify at length concerning the crime scene and, specifically, the projectiles discovered there. After a recess, however, defense counsel requested a mistrial, stating that she did not learn about the supplemental report until Officer Jenkins testified. The trial court addressed defense counsel as follows: “I thought there was some discussion here at the witness stand and you returned to your seat and I waited for you to renew your objection and you indicated that everything was fine.” The prosecutor indicated that he believed defense counsel had withdrawn her earlier objection. After inquiring as to the significance of the supplemental report at issue, the trial court denied King’s motion for a mistrial.

Preservation

It is well-settled that a party seeking a mistrial must timely request that the court grant such relief. *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989) (citing *Jenkins v. Commonwealth*, 477 S.W.2d 795 (Ky. App. 1972)); see

also RCr 9.22 (requiring a party to make known to the court the action which that party desires the court to take). A timely motion for a mistrial provides the trial court the opportunity to correct an error. *Olden v. Commonwealth*, 203 S.W.3d 672, 675 (Ky. 2006). “Simply voicing your intentions to object at some later time, but then failing to do so when the time draws nigh, does not serve the purpose of the rule” *Id.*

Contrary to the argument of the Commonwealth, it is not the timeliness of the motion which is problematic in this case. At the time King became aware of the substance of the supplemental report, it had not been disclosed to the jury. Accordingly, there would have been no basis for a mistrial at that point because no damage had been done. However, by not objecting to the content of the report or to Officer Jenkins’ testimony concerning the report, King invited the admission of the evidence by acquiescence. In order for the mistrial motion to have been appropriate in this instance, King should have first objected to any further testimony concerning the content of the report. Since this did not occur, the trial court was not offered the opportunity to rule on the admissibility of the testimony prior to its introduction. Such a ruling may have obviated the need for a mistrial motion.

In *Mullins v. Commonwealth*, we held that a defendant's motion for a mistrial based upon the erroneous admission of a pretrial services officer’s testimony was untimely, despite the defendant’s timely objection to the contested testimony. No. 2011-SC-000634-MR, 2012 WL 6649199, at *5 (Ky. Dec. 20, 2012). In that case, the defendant did not request a mistrial until well

after her objection to a witness' testimony was overruled. *Id.* Similarly, defense counsel in the present case objected to Officer Jenkins' testimony concerning the supplemental report on the basis that she had not received the report, but failed to move for a mistrial until after the jury had heard most of the objectionable testimony.

Further, RCr 7.24(9), which provides means for resolution of discovery disputes even when such issues are revealed during trial, was satisfied in this instance. The Commonwealth voluntarily provided defense counsel with the supplemental report, who then reviewed it in its entirety. The Commonwealth did not continue to question Officer Jenkins regarding the supplemental report until after defense counsel reviewed the report and was given the opportunity to assert a formal objection, which she declined to do. Because King's request for a mistrial occurred after Officer Jenkins' testimony, it was untimely. However, we will review for palpable error. *See Mullins*, 2012 WL 6649199, at *5; *Couch v. Commonwealth*, 256 S.W.3d 7 (Ky. 2008) (admission of the testimony of a witness violating the criminal procedure rule governing the confidentiality of pre-trial services agency records reviewed for palpable error).

Palpable Error Review

"In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)). Because of the

overwhelming evidence in this case, the trial court's denial of King's mistrial motion did not result in palpable error.

The jury was instructed as to attempted murder and wanton endangerment. King's argument at trial was that he fired the gun into the air and not at Johnson. He asserts that the significance of the supplemental report was that it revealed measurements documenting the location of the projectiles. From that report, Officer Jenkins testified that, based on the topography of the yard and placement of the projectiles, King was shooting directly at Johnson and not at the ground or into the air. Therefore, according to King, his entire trial strategy was destroyed. He specifically contends that defense counsel labored under a misconception that there was no evidence of the trajectory of the bullets and that he was unable to effectively cross-examine Officer Jenkins. Lastly, King maintains that he would have sought his own expert witness if he had been properly informed of the supplemental report prior to trial.

However, a Kentucky State Police ballistics expert testified extensively regarding the shell casings without King's objection. Photographs taken at the crime scene of bullet holes in the ground and of the projectiles themselves were also introduced as exhibits for the Commonwealth without objection. Furthermore, the existence or non-existence of a written report documenting Officer Jenkins' observations does not negate the admission of the officer's testimony concerning his perception of the crime scene and its contents.

Most importantly, however, the record is replete with evidence demonstrating King's guilt. For example, multiple witnesses testified at trial that King repeatedly threatened death and violence against Johnson. Johnson and other witnesses further testified that King assaulted her. Most damning, Johnson testified that she saw King point the handgun directly at her and then fire two shots as she was fleeing from the garage. If there was any error in failing to order a mistrial, the error was certainly not palpable.

Jury Instructions

Lastly, King contends that the trial court improperly instructed the jury as to the wanton endangerment charge. King specifically objected to the wording of that instruction. See RCr 9.54(2). In *Stewart v. Commonwealth*, we stated that, “[w]hile any error in jury instructions is presumptively prejudicial, we have likewise acknowledged that such errors are subject to harmless error analysis, though the Commonwealth bears the burden of this assertion.” 306 S.W.3d 502, 508 (Ky. 2010) (citing *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008)). When reviewing claims of error in failing to give a jury instruction, we consider the evidence in the light most favorable to the moving party. *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005).

As noted, the jury was instructed on attempted murder and first-degree wanton endangerment. The jury instruction for the latter states in part as follows:

If you do not find the Defendant guilty under Instruction No.1, you will find the Defendant guilty of First-degree Wanton Endangerment under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about April 16, 2013, and before the finding of the indictment, **he shot at Pamela Johnson** with a 9 millimeter handgun

(Emphasis added).

King requested that the phrase, “he shot at Pamela Johnson,” be changed to, “he fired the gun while Pamela Johnson was in the area.” The trial court rejected the latter language, noting that if the jury believed King’s statement that he only fired the gun into the air, they would have to acquit King of the charge entirely.

KRS 508.060 provides that “[a] person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.” In *Gilbert v. Commonwealth*, we held that the essential elements of the offense of wanton endangerment were not present where the gun allegedly used by the defendant was never pointed at the victim. 637 S.W.2d 632 (Ky. 1982). However, in *Smith v. Commonwealth*, we held that the elements of first-degree wanton endangerment were satisfied where the defendant, from atop a bucking horse, deliberately fired a shot at the side of the porch where the victims were seated and continued to fire uncontrolled shots in that direction. 410 S.W.3d 160, 165-66 (Ky. 2013). The danger of ricocheting bullets is

also a consideration in wanton endangerment cases. *See, e.g., Hunt v. Commonwealth*, 304 S.W.3d 15, 38 (Ky. 2009).

Johnson testified that King fired the gun at her. King testified that he did not shoot the gun at Johnson, but rather into the air, intending not to harm her. King further testified that he never pointed the gun directly at Johnson. He argues that, since it was uncontroverted that the gun was fired, the jury had only two choices, attempted murder or wanton endangerment. Yet, the jury had one other option—acquittal.

King's proffered wanton endangerment instruction allowing the jury to find guilt if they determined that King "fired the gun while Pamela Johnson was in the area," would only broaden the scope of the requisite criminal act necessary for a conviction. Not only does that wording appear incongruous with KRS 508.060, it is arguably counterproductive to King's interests. Thus, the jury was properly instructed.

Conclusion

For the foregoing reasons, we hereby affirm the judgment of the Muhlenberg Circuit Court.

All sitting. All concur.

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